Task Force on the Arizona Rules of Criminal Procedure

Meeting Agenda

Friday, July 29, 2016
9:30 AM to 4:30 PM
State Courts Building * 1501 West Washington * Conference Room 230 * Phoenix, AZ
Conference call-in number: (602) 452-3288 Access code: 8085

Item no. 1	**Call to Order** **Introductory comments**	*Judge Welty, Chair*
Item no. 2	**Approval of June 17, 2016 meeting minutes**	*Judge Welty*
Item no. 3	**Discussion of workgroup drafts** - **Workgroup 1: Rule 15** - **Workgroup 2: Rule 6** - **Workgroup 3: Rule 22** - **Workgroup 4: Rules 14 and 16**	 *Judge Duncan, Mr. Euchner, Mr. Vick* *Judge Cattani* *Judge Jeffery* *Judge Tang, Ms. Kalman*
Item no. 4	**Roadmap and additional rule assignments** - **Future Task Force meeting dates:** **September 16** **October 27** **December 9** **All of the meetings are on Friday, except for Thursday, October 27.**	
Item no. 5	**Call to the Public** **Adjourn**	*Judge Welty*

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

Task Force on the Arizona Rules of Criminal Procedure ("CRTF")

State Courts Building, Phoenix

Meeting Minutes: June 17, 2016

Members attending: Hon. Joseph Welty (Chair), Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Richard Fields, Hon. Pamela Gates, Bill Hughes by his proxy Josh Fisher, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag, Jerry Landau, Hon. Mark Moran, Aaron Nash, Natman Schaye, Hon. Paul Tang, Kenneth Vick

Absent: Paul Ahler, Hon. Maria Felix

Staff: John Rogers, Mark Meltzer, Julie Graber, Sabrina Nash

1. Call to order; introductory comments; approval of meeting minutes. The Chair called the fourth meeting of the Task Force to order at 10:02 a.m. He introduced Mr. Fisher, who is attending as Mr. Hughes' proxy. There have been 26 workgroup meetings to date, and the Chair commended the workgroups for their diligence. The Chair requested members to submit to workgroup chairs any comments on pending rules, and that they inform workgroups of issues that require further consideration. Workgroups should attempt to reach consensus on those issues in advance of Task Force meetings, or they should flag potential issues in advance of the plenary meeting. The Chair added that members should not construe his request as limiting comments during a meeting, which will continue to be open for full and complete discussions. The Chair then asked members to review the draft May 13, 2016 meeting minutes, and a member made the following motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **CRTF-004**

The Chair advised that today's meeting materials included a memo from Judge Gates concerning Rule 10. The Task Force will revisit that rule, as well as Rule 7, Rule 1, and Rule 35, which Rule 1 now incorporates. The members will then proceed to Rules 13, 3, 8, 14, 9, 16, 34, and 6. Ms. Graber will continue to make on-screen changes during the course of the meeting to allow members to review changes in real time. The Chair will assess at the end of the session whether a seven-hour meeting has been productive and effective, and whether another extended meeting would be appropriate.

2. Assignment of new rules to the workgroups. Before discussing the above-referenced rules, the Chair assigned new rules to the workgroups, as follows:

Workgroup 1 – Rules 20 and 24

Workgroup 2 - Rule 32

Workgroup 3 – Rules 17, 22, and 23

Workgroup 4 – Rules 18, 19, 21, and 25

3. **Workgroup 1.** Judge Duncan and Mr. Rogers led the discussion on Rules 1 and 35.

Rule 1 ("Scope, purpose and construction, computation of time, definitions, size of paper, and other general provisions") and Rule 35 ("form, content, and service of motions and requests"). Judge Duncan noted that she received a comment concerning Rule 1 from Judge Gates, and the workgroup will consider this comment at its next meeting. Mr. Rogers specifically explained how the workgroup's draft of new Rule 1.9 incorporates current Rule 35. The workgroup agreed that these provisions were more appropriately located within Rule 1, along with other rules for filing and service, and that they belong at the beginning of the set of criminal rules rather than being one of the last rules. Mr. Rogers suggested that the text of Rule 16 also include a brief cross-reference to Rule 1.9. The adoption of Rule 1.9 would result in the abrogation of Rule 35, and this may require renumbering of subsequent rules, or Rule 35 may be a placeholder for a new rule.

A member suggested, and the Task Force agreed, to change a provision in draft Rule 1.9(a). The current draft states that a motion must include a memorandum that states "pertinent facts, arguments, and authorities supporting the motion." The change uses the phrase, "facts, arguments, and authorities that are pertinent to the motion." This change should permit briefer motions on routine matters, such as a motion to continue or a stipulated motion. The members also discussed the mechanism under draft Rule 1.9(f) for submitting a proposed order. Attorneys often submit the order directly to a judge's chamber; some also file a "notice of lodging" with the clerk. Mr. Rogers noted that a judge may not make changes to a filed document, so it is important that parties not file proposed orders. Mr. Nash noted that Civil Rule 5(j) precludes the filing of a proposed order. Maricopa County has different systems for electronic filing in civil and criminal cases. Proposed orders pass through the civil e-filing system without actual filing. Mr. Nash said that Court may amend the civil rule later this year, and Task Force members should be alert for those amendments. Meanwhile, members criticized the current draft of Rule 1.9(f) for providing insufficient guidance to filers about what they need to do with a proposed order. But the Chair noted that although vague, the current process for submitting proposed orders has functioned adequately over recent years. As a compromise, members agreed to add the following sentence to draft Rule 1.9(f): "Absent a notice of lodging, proposed orders will not be part of the record."

Other Rule 1 topics of discussion included the following:

- Mr. Rogers explained how an increase in the font size to 13 point [Rule 1.6(b)(1)(B)] resulted in corresponding increases in the page limits of a motion, response, and reply under Rule 1.9(c).
- In response to a question about the meaning of "next day" in Rule 1.3(a)(4), Mr. Rogers explained the derivation of this definition from the federal rules, and how it was incorporated into the civil rules restyling. The concept of "next day" is a protocol for counting days before and after an event. It provides a method of counting backward from a date, for example, when a judge says that parties must file memorandum 10 days before a hearing. In addition, it provides for counting forward when calculating a deadline after an event, e.g., the judge says the memo is due 10 days from today. The Chair agreed that because Arizona's civil rules and the federal rules use the "next day" terminology, it is likewise appropriate to include this in the criminal rules.
- A judge member inquired about the meaning of the phrase "public welfare" in the second sentence of Rule 1.2. Members proposed alternative phrases, but decided to retain the draft as it now appears.
- Members also reviewed the definitions in draft Rule 1.4. They were satisfied that the definition of "defendant" included defense counsel when it is warranted by the context. The inclusion of "chief justice and justices" in the definition of "magistrate" was not redundant but rather conforms to the corresponding statutory definition. Mr. Landau submitted several pre-meeting comments concerning these definitions that the workgroup will review at its next meeting.

4. Workgroup 4. Judge Tang and Judge Gates followed up on pending issues under Rule 10.

Rule 10 (Change of judge or place of trial). Does a party's failure to assert a change of judge for cause before the start of trial preclude a later request based on something the party learns during the proceeding? How does a party preserve for appeal a Rule 10.1 request for a change of judge? Judge Gates characterized these issues as complex. A party in these circumstances must take some action, and cannot simply wait for the outcome of the trial. This concept is codified in draft Rule 10.1(b)(4), which is derived from a comment to the existing rule. However, the rule does not specifically address how a party preserves a challenge for cause for appeal. One member suggested that a rejected challenge might be a structural error, which is inherently preserved. Another member thought an appellate court might review the record for fundamental

error. A judge member wanted to include more guidance on how a party could preserve the challenge, and noted that a motion for new trial may be untimely because a party has a limited time to raise a Rule 10.1 challenge. Another judge suggested that the rule should provide only that the challenge "may be appropriately preserved for appeal." Judge Tang observed there are so many potential scenarios where the issue might arise that the Task Force should simply defer to case law rather than incorporate anything into a rule. The Chair suggested as an alternative that the rule instruct that a party has a right to make a record for review. After further discussion, the members agreed to the following changes.

- The first two sentences of draft Rule 10.1(b)(1) were consolidated into a single sentence by the elimination of extraneous verbiage.
- The last sentence of draft Rule 10.1(b)(1) now includes the principle expressed in draft Rule 10.1(b)(3), and the latter provision was deleted. Rule 10.1(b)(1) now provides that a party may preserve for appeal any allegations of prejudice that arise after commencement of a trial "by making an appropriate motion." The members believed that this language was preferable because it did not specify what the motion should be; that motion is contingent on the circumstances. An "appropriate motion" may, but need not be, a motion for new trial. The members left as an open question whether the phrase "preserved for appeal" encompasses a special action proceeding. A straw vote indicated the members' approval of the modified provision, with 10 in favor and 3 opposed.
- The members agreed to delete draft Rule 10.1(b)(4) ("waiver"), although the Task Force may retain the principle stated in that provision as a comment to the rule.
- The members also discussed whether the operative word in Rule 10.1 should be after a trial "commences" or after a trial "begins." Some members believed that "commences" has legal meaning, but others thought that "begins" would have an equivalent meaning. The preference of most members was to use "begins," and although exceptions might exist, they will attempt to use the term "begins" throughout the rules. (For examples, the members changed Rule 10.2(e) from "commencement of trial" to "beginning of trial," and Rule 10.3(d) from "allows a proceeding to commence" to "allows a proceeding to begin.")

Rule 10.2(a)(1) provides in part that "each side in a criminal case" is entitled to a peremptory change of judge. The members initially believed the phrase "in a criminal case" was obvious and superfluous, but Judge Gates explained the significance of those words under applicable case law, and the draft will retain them. The members also

discussed language in Rule 10.2(b)(2) that provides, "an attorney's avowal is in the attorney's capacity as an officer of the court." Does that phrase need to be included whenever the rules refer to an attorney's representations to the court? If not, why are those words included in Rule 10.2(b)(2)? Judge Gates provided the history of the rule. She stated it was the result of compromise, and the rule incorporates this language to remind attorneys of the significance of this avowal. The members agreed to retain the "avowal" phrase in Rule 10.2(b)(2), and also agreed that it did not require inclusion elsewhere. Rule 10.2(d)(3) regarding multiple defendants derives from current Rule 10.5(a). Members noted with approval that the language in the draft rule was discretionary. A member had a question concerning the interpretation of Rule 10.2(f). After discussion, the members believed that a party who had an unused 10.2 right following a remand could then notice the judge who did the original trial and sentencing. The draft rule does not resolve whether that right still exists following the remand of an aggravation or penalty phase in a capital case.

Because of revisions to draft Rule 16, the workgroup changed a reference in current Rule 10.3(c) from "omnibus hearing" to "pretrial conference" in the draft rule. Draft Rule 10.3(e) renews rights under Rule 10 upon an appellate remand "on one or more offenses charged in an indictment or information…." The members agreed to delete the words "in an indictment or information" so that the rule is applicable to remands of offenses charged by complaint. In draft Rule 10.4, the members agreed to change "transferor county" to "transferring county" and "transferee county" to "receiving county." They also changed a requirement that the sheriff "transfer the defendant" to one that requires the sheriff to "transport the defendant."

5. **Workgroup 3.** Judge Jeffery updated the members on proposed changes to Rule 7.

Rule 7 ("Release"). Judge Jeffery noted that draft Rule 7.2 now includes an express reference to A.R.S. § 13-3967(b), as previously suggested by the Task Force. The workgroup considered reiterating the statutory factors within the body of the rule, but there are numerous factors and the cross-reference should sufficiently alert stakeholders to the existence of those factors. Mr. Landau noted that Rule 7 includes references to both "bail" and "bond," and the Court's Fair Justice for All Task Force is having on-going discussions about the distinctions between these two terms. Those discussions may result in proposals for statutory changes, but those distinctions are not a matter the CRTF needs to consider at this time. Judge Cattani noted that unlike the current rule, Rule 7.1 does not describe an appearance bond as a written form. The members therefore agreed to modify draft Rule 7.1(b) by defining an appearance bond as a "written promise."

6. Workgroup 4. Mr. Nash presented a new rule to the Task Force, Rule 13.

Rule 13 ("Indictment and Information"). Rule 13.1, "definitions and nature," was restyled. The members added the words "and dismissal" to the title of Rule 13.2, which is now "timeliness of an information and dismissal." Rule 13.3 concerns "joinder." Rule 13.3(c) concerns "consolidation," and provides that the court may consolidate proceedings "on motion or on its own." The members discussed whether it was necessary to use that phrase, but decided to retain it for clarification. A member of Workgroup 2 noted that Rule 6 uses similar phrasing. Rule 13.4 deals with severance. One member proposed revisions to draft Rule 13.4(a) that included deletion of the phrase "necessary to promote a fair determination." A Workgroup 4 member noted that this phrase is significant in the applicable case law, and the members accordingly retained it in the draft rule. The member also suggested that draft Rule 13.4(a) contained unnecessary verbiage in a single long sentence. Without changing the meaning of the rule, the members agreed to revisions that deleted that verbiage. Draft Rule 13.4(b), "as of right," as well as the current rule, includes a reference to the rules of evidence. Inasmuch as the rule requires "admissible evidence," a member thought the subsequent phrase, "under the rules of evidence," was unnecessary. The members agreed and deleted that phrase. The members made minor edits to Rule 13.4(c) ("timeliness and waiver"). The workgroup's changes to Rule 13.5 ("amending charges; defects in the changing document") were primarily stylistic.

7. <u>Workgroup 1.</u> Mr. Vick presented Rule 3.

Rule 3 ("Arrest warrant or summons upon commencement of criminal proceedings"). Mr. Vick noted that this rule uses the term "peace officer," which is the term utilized in corresponding statutes. A member suggested, and the Task Force agreed, that the title of Rule 3.1(e) ("warrants in ATTC cases") should include the word "criminal" before "ATTC" to distinguish criminal citations from civil traffic citations. In Rule 3.2(a)(5), the members also agreed to delete the word "secured" before the words "appearance bond," so the rule now encompasses secured as well as unsecured bonds. A member suggested that Rule 3.2(b)(3), which requires a defendant to appear for ten-printing, specify that a defendant charged with a felony must report to the sheriff. However, the members thought the current language, which requires the defendant to report to the "applicable law enforcement agency," was sufficient.

Draft Rule 3.3(b), concerning the execution of warrants, stated in part, "the officer does not need to possess the warrant when the arrest is made." The members discussed whether "possess" should instead be "present," but decided on the former. They made stylistic revisions to draft Rule 3.3(c). Draft Rule 3.3(d) concerns a defective warrant. The

members discussed whether the most appropriate word was "invalid" or "invalidated," and ultimately rephrased the first sentence of this rule to state, "A defect in form does not invalidate the warrant or require release of a person in custody." The members did not change the second sentence of this draft rule, which states, "A magistrate may amend a warrant to correct a defect in form." Rule 3.4(c)(2) permits service of a summons on an individual "at the individual's dwelling or usual place of abode…." The members discussed whether the rule should instead refer to the individual's "residence," but they retained the existing language because it conforms to the proposed civil rules on service. Similarly, and following discussion, the members retained the draft provisions regarding service on a minor because they too conform to proposed civil rules.

8. **Workgroup 3.** Judge Jeffery presented Rules 8, 34, and 9.

Rule 8 ("Speedy trial"). Draft Rule 8.1(b) provides a preference for the trial of a defendant "whose pretrial liberty may present unusual risks…." The members discussed how this phase might apply. One member suggested that it might be applicable where a defendant has a medical issue. In any event, because the phrase appears in the current rule, the members retained it in the draft. The members made restyling changes to draft Rule 8.1(c) ("duty of the prosecutor"), and deleted unnecessary verbiage in draft Rule 8.1(d) ("duty of defense counsel.") They made no changes to Rule 8.1(e) ("suspension of Rule 8.")

To improve clarity, the members made a couple revisions to Rule 8.2(a): they changed "subject to Rule 8.4's exclusions" to "subject to Rule 8.4;" and they shortened the phrase "the court having jurisdiction over an offense" to simply, "the court." They made minor restyling changes to the remainder of Rule 8.2(a). In Rule 8.2(b), the members changed "person" to "defendant." Time limits for complex cases specified in current Rule 8.2(a)(3) include a special provision for cases filed between December 1, 2002 and December 1, 2005. The members did not discern why those cases were exceptional, and regardless, there are probably very few such cases, if any, that now are still pending, and accordingly, the members deleted the provision. The members changed the time requirement for a new trial under draft Rule 8.2(c) from "60 days after the court order is filed" to "60 days after entry of the court's order." This change recognized that there could be a delay between the entry and the filing of the order, which should not reduce the time for a speedy retrial. Although the members agreed to change the phrase in Rule 8.2(c) from "must commence" to "must begin," it precipitated another discussion about the legal significance of the word "commence." The members then agreed to include a comment, which would state that by changing "commence" to "begin," the members did not intend a substantive change or an alteration of existing case law. The anticipated comment may be either to a specific rule, or within a general prefatory comment. Draft Rule 8.2(e) provides that the superior court must set a specific trial date at the

arraignment or at a pretrial conference. The members discussed whether this provision enhanced or posed an obstacle to good case management. The members made no substantive changes to the rule after that discussion, but they did reorder the phrases of this section for better syntax.

The draft of Rule 8.3 ("prisoner's right to a speedy trial") referred to "the prosecutor with the duty of prosecuting" the charge. The members agreed to change this to "the responsible prosecuting agency." The members also agreed that "the State" was not an appropriate substitute for this phrase in the context of this particular rule.

Draft Rule 8.4 ("excluded periods") includes in paragraph (a) the phrase "whether or not willful or intentional." This phrase does not appear in the current rule, but similar language is contained in the comment to the current rule, and the members agreed to retain this phrase in the draft. Draft Rule 8.4(e) excludes delays "resulting from continuances under Rule 8.5." The members discussed whether this applied to continuances requested by a defendant, or also to a continuance requested by another party. The members decided that no changes to this provision were required. The draft of Rule 8.4(f) failed to include particular language of the current rule, which provides that in certain circumstances involving joinder, "severance should be granted to preserve the applicable time limits." After discussing Rules 13.3 and 13.4, the members agreed to add that phrase to the draft.

The title of draft Rule 8.5 is "postponing a trial date." A member noted that the word "continuances" is part of the court's everyday vernacular, and the Task Force should use forms of that word rather than variations of "postponements." Another member supported this change and observed that "continue" suggests the proceeding has already started, whereas "postpone" implies delay. The members agreed to revert to the word "continuance." The member also agreed to a more concise phrasing for Rule 8.5(a) ("motion"), but retained in the rule a requirement that the motion state the specific reasons for the request. The members also agreed to rephrase Rule 8.5(b) ("grounds") to reduce its verbosity. The members rejected a suggestion that a motion to continue should include a certificate of good faith. They also discussed Maricopa County's Rule 8 Guidelines, which appear after the current rule, and whether to retain them in whole, in part, or as a modified comment. The members agreed to delete the guidelines from the draft in their entirety.

The members improved the phrasing of draft Rule 8.6 ("denial of speedy trial") following several proposed changes shown on-screen. In draft Rule 8.7 ("accelerating trial"), the members discussed whether special circumstances might exist, other than those particular to the victim, which might warrant acceleration of a trial date. The members concluded it would be appropriate to add to this provision these words: "…special circumstances relating to the victim <u>or other good cause</u>…." A judge member

noted that although this change conforms to current practice, it is a substantive change that the Task Force should note for the Court.

Rule 34 ("Subpoenas"). Judge Jeffery noted that the workgroup added a new Rule 34(a) as an introduction to the rule on subpoenas. The workgroup restyled Rule 34(b) concerning the alternative form of subpoena. In Rule 34(c), it changed "magistrate court" to "municipal court." It also deleted a portion of the text of the comment to the current rule, but it retained statutory references in this comment that govern subpoena requirements in criminal cases. Rule 41 includes two pertinent forms. To link these forms to Rule 34, the Task Force agreed to add a new sentence to Rule 34(a), "the subpoena must be substantially in the form shown in Rule 41, Form 27(a)." It also added a new sentence to Rule 34(b), "the alternative subpoena must be substantially in the form shown in Rule 41, Form 27(b)."

Rule 9 ("presence of the defendant, witnesses, and spectators"). Mr. Vick proposed simplified language for Rule 9.1, which the members adopted. Rule 9.1 includes the phrase "if the defendant had notice…." The members discussed whether notice needed to be actual and personal, or whether it could be implied or constructive notice. The members decided that the rule did not require this level of specificity, and that "notice is notice." The final provision the members discussed at the meeting was Rule 9.2(b). There were two issues. First, does the phrase "if the defendant personally assures the court" permit defense counsel to make assurances to the court on defendant's behalf? Second, "must" or "may" the court grant the defendant a reasonable opportunity to return to the proceeding if the defendant gives those assurances? The workgroup will consider these issues when it reconvenes.

9. <u>Roadmap; call to the public; adjourn.</u> The Chair reminded the members to send any comment on pending rules to the workgroup chairs early enough to allow for their consideration by the workgroups. This preliminary review process should expedite Task Force meetings. The Chair believes that another extended Task Force meeting is necessary to stay on schedule. The next meeting is Friday, July 29, 2016. The members' preferred hours for the meeting were 9:30 a.m. to 4:30 p.m.

There was no response to a call to the public. The meeting adjourned at 4:46 p.m.

III. Rights of Parties

Rule 6. Attorneys, Appointment of Counsel

Rule 6.1. Right to Counsel; Right to a Court-Appointed Attorney; Waiver of the Right to Counsel

(a) Right to Be Represented by Counsel. A defendant has the right to be represented by counsel in any criminal proceeding. The right to be represented by counsel includes the right to consult privately with an attorney, or the attorney's agent, as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow counsel to adequately prepare for the proceeding.

(b) Right to a Court-Appointed Attorney.

(1) ***As of Right.*** An indigent defendant is entitled to a court-appointed attorney in any criminal proceeding that may result in punishment involving a loss of liberty.

(2) ***Discretionary.*** In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.

(c) Waiver of Right to Counsel. A defendant may waive the right to counsel under (a) and (b) if the waiver is in writing, and if the court finds that the defendant's waiver is knowing, intelligent and voluntary. After a defendant waives the right to counsel, the court may appoint advisory counsel for the defendant at any stage of the proceedings. In all further matters, the court must give advisory counsel the same notice that is given to the defendant.

(d) Unreasonable Delay in Retaining Counsel. If a defendant appears at a proceeding without counsel, the court may proceed if the defendant waives counsel under (c), or the court finds that the defendant (1) is not indigent, or, if indigent, has refused appointed counsel; and (2) has had a reasonable opportunity to obtain counsel.

(e) Withdrawal of Waiver. A defendant may withdraw a waiver of the right to counsel at any time. But the fact that counsel is later appointed or retained does not establish a basis for repeating any proceeding previously held or waived.

Note: Draft Rule 6.1(a)(3) is derived from a comment to the existing rule.

Rule 6.2. Appointment of Counsel for Indigent Defendants

(a) Procedure. The presiding judge of each county must establish a procedure for the superior court and limited jurisdiction courts to appoint counsel for indigent defendants.

(b) Capital Trial Proceedings. In all capital trial proceedings where the defendant is indigent, the presiding judge must appoint two attorneys—lead counsel and co-counsel—under Rule 6.8(b). The appointed lead counsel may designate co-counsel if co-counsel is willing to accept the appointment and meets the requirements of Rule 6.8. If lead counsel does not promptly designate co-counsel, the court must do so.

Rule 6.3. Duties of Counsel; Withdrawal

(a) Notice of Appearance.

(1) ***Generally.*** Before representing the defendant in court, counsel – whether privately retained or appointed by the court -- must file a notice of appearance.

(2) ***Earlier Appearance in a Limited Jurisdiction Court.*** Counsel who has filed a notice of appearance in a felony case in a limited jurisdiction court does not need to file a new notice of appearance if the defendant is bound over to superior court.

(b) Duty of Continuing Representation. Unless the court permits counsel to withdraw, counsel who represents a defendant at any stage of a case has a continuing duty to represent the defendant in all further proceedings in the trial court, including the filing of a notice of appeal.

(c) Withdrawal.

(1) ***If the Defendant Is Ineligible for Appointed Counsel.*** Appointed counsel may not withdraw after arraignment on the ground that the defendant is ineligible for appointed counsel unless counsel shows that withdrawal will not disrupt the orderly processing of the case.

(2) ***If the Case Is Set for Trial.*** After a case is set for trial, the court may not permit counsel to withdraw unless counsel files a motion that provides:

(A) the name and address of new counsel and a signed statement from the new attorney that acknowledges the trial date and avows that the new attorney will be prepared for trial; or

(B) ethical grounds for withdrawing.

(d) Duty of Defense Counsel to Preserve the File. Defense counsel must:

(1) maintain records of the case in a manner that will inform successor counsel of all significant developments relevant to the case; and

(2) make available to successor counsel the client's complete records and files, as well as all information regarding every aspect of the representation.

(e) Duty of Successor Counsel to Collect the File in a Capital Case. Immediately upon undertaking representation of a defendant in a capital case in which the defendant was previously represented by counsel, defense counsel must collect the complete file from prior counsel and maintain the records and files in a manner that complies with Rule 6.3(d).

Note: Draft Rule 6.3(a)(2) is derived from a comment to the existing rule.

Rule 6.4. Determining Whether a Person Is Indigent

(a) Definition. As the term is used in Rule 6.1(b), "indigent" means a person who is not financially able to retain counsel.

(b) Questionnaire. To show indigency, a defendant must complete under oath a financial resources form approved by the Supreme Court. A judicial officer responsible for determining whether a defendant is indigent may question the defendant under oath regarding the defendant's financial resources. Before questioning, the court must advise the defendant of the penalties for perjury set forth in A.R.S. § 13-2701, et seq.

(c) Redetermination of Indigency. If there is a material change in circumstances, the defendant, defense counsel, or the State may request that the court make a new indigency determination.

(d) Payment by the Defendant.

(1) ***Generally.*** If a court finds that a defendant can afford to pay part of the cost of appointed counsel without incurring substantial hardship, the court may order the defendant to pay that amount to the court clerk.

(2) ***Failure to Pay.*** A defendant's failure to pay an amount ordered by the court, is not a basis for finding the defendant in contempt, and appointed counsel may not withdraw solely on this ground. But the county or municipality may enforce an order under (d)(1) as a civil judgment.

(3) ***Court Order Required.*** Without court approval, an attorney, organization, or agency may not otherwise request or accept payment from the defendant for providing legal services under the court appointment.

Note to Rule 6.4(a). This standard is drawn from Arizona Revised Statutes § 11-584(1).

Rule 6.5. Manner of Appointment

(a) Appointment Order. The court must appoint counsel by a written order, and must provide a copy of the order to the defendant, the appointed attorney, and the State.

(b) Public Defender Appointment. In counties that have a public defender, the court must appoint the public defender to represent persons entitled to appointed counsel whenever the public defender is authorized by law to undertake the representation and is able to do so.

(c) Other Appointments. If the court does not appoint a public defender, the court must appoint a private attorney. In appointing private counsel, the court must take into account the skill likely to be required in handling the case.

(d) Requests for Representation before a Grand Jury. A request for appointment of counsel under Rule 12.6 must be made and processed as if proceedings had already commenced in superior court.

Rule 6.6. Appointment of Counsel on Appeal

If a court permits counsel to withdraw after conviction, either the trial court or an appellate court must appoint new counsel for a defendant who is eligible for court-appointed counsel on appeal. [Note: should this rule be incorporated in Rule 31.5?]

Rule 6.7. Compensation of Appointed Counsel

(a) Where to File a Compensation Claim. A private attorney appointed to represent an indigent defendant must file a claim for compensation as provided by local rule in the county in which the appointment was made, or from which the appeal was taken.

(b) When to File a Compensation Claim.

(1) ***Trial Court.*** Trial counsel may file claims for compensation at intervals permitted by the court, and must file a final claim at the completion of all trial, sentencing, or post-conviction proceedings.

(2) ***Appellate Court.*** Appellate counsel may file claims for compensation at intervals permitted by the court, and must file a final claim at the completion of all appellate proceedings.

(c) Proceedings in a Limited Jurisdiction Court. An attorney is entitled to compensation for services rendered in a limited jurisdiction court.

(d) Amount of Compensation. An attorney must be reasonably compensated for the services performed, considering the hours worked, the experience of counsel, the seriousness and complexity of the case, the quality of the work performed, and any other relevant factors. The manner of determining reasonable compensation is provided by local rule and A.R.S. § 13-4013.

Note: Although allowed under current Rule 6.7(d), this draft rule eliminates circumstances where a defendant makes partial payments directly to court-appointed counsel. A defendant makes partial payments directly to the county or municipality, through the clerk of its court, as provided in draft Rule 6.4(d).

Rule 6.8. Standards for Appointment and Performance of Counsel in Capital Cases

(a) Generally. To be eligible for appointment in a capital case, an attorney must:

(1) have been a member in good standing of the State Bar of Arizona for at least 5 years immediately before the appointment;

(2) have practiced in the area of state criminal litigation for 3 years immediately before the appointment; [Note: adding the word "defense" before "litigation," as Nat suggested, would be a substantive change.]

(3) have demonstrated the necessary proficiency and commitment that exemplifies the quality of representation appropriate to capital cases;

(4) attended and successfully completed, within one year prior to the initial appointment, at least 6 hours of relevant training or educational programs in the area of capital defense, and attended and successfully completed within one year before any later appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense;

(5) have familiarity with the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines"), and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. Some guidelines may not be applicable to Arizona practice or to the circumstances of a particular case, but counsel should be guided by the performance standards when applicable.

If an attorney is a member in good standing of the State Bar of Arizona, the attorney's practice in a federal jurisdiction or in another state may be considered for purposes of satisfying the requirements of Rule 6.8(a)(2) . [Note: should this be (1) through (3), as the current rule states, or only (2), as Nat suggests?]

(b) Trial Counsel.

(1) ***Lead Counsel.*** To be eligible for appointment as lead trial counsel, an attorney must meet the requirements of Rule 6.8(a) and must have:

(A) practiced in the area of state criminal litigation for 5 years immediately before the appointment; and

(B) been lead counsel in at least 9 felony jury trials that were tried to completion, and have been lead counsel or co-counsel in at least one capital jury trial.

(2) ***Co-counsel.*** To be eligible for appointment as co-counsel, an attorney must meet the requirements of Rule 6.8(a).

(c) Appellate Counsel. To be eligible for appointment as appellate counsel, an attorney must meet the qualifications set forth in Rule 6.8(a) and within 3 years immediately before the appointment, the attorney must:

(1) have been lead counsel in an appeal in a case in which a death sentence was imposed (including petitions for review of post-conviction proceedings); and have prior experience as lead counsel in the appeal of at least 3 felony convictions; or,

(2) alternatively, have prior experience as lead counsel in the appeal of at least 6 felony convictions, including two appeals from first or second degree murder convictions. [Nat wants “defense” before “counsel.”

(d) Post-conviction Counsel. To be eligible for appointment as post-conviction counsel, an attorney must meet the qualifications set forth in Rule 6.8(a) and within 3 years immediately before the appointment, the attorney must:

(1) have been lead defense counsel in a trial in which a death sentence was sought or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and have prior experience as lead defense counsel in the appeal of at least 3 felony convictions and a trial or post-conviction proceeding with an evidentiary hearing; or

(2) have been lead defense counsel in the appeal of at least 6 felony convictions, including two appeals from first or second degree murder convictions, and lead

defense counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings.

(e) Exceptions. In exceptional circumstances, a court may appoint an attorney who does not meet the qualifications set forth in this rule if:

(1) the Supreme Court consents;

(2) the attorney meets the requirements set forth in Rule 6.8(a)(3-5);

(3) the attorney's experience, stature, and record establishes that the attorney's ability significantly exceeds the standards set forth in this rule; and

(4) the attorney associates with a lawyer who meets the qualifications set forth in this rule and the associating attorney is appointed by the court for this purpose.[Note: Discuss this last added phrase.]

~~**(g) Court Assurance.** The court must assure that appointed counsel in a capital case meets the qualifications established by this rule.~~ [This provision is new. The workgroup decided it should not be included in the rule, but consideration should be given to including it in a comment as a best practice. It contemplates a colloquy between the trial court and counsel to assure that counsel is qualified.]

Rule 14. Arraignment

Rule 14.1. General Provisions

The purpose of arraignments is to formally advise defendants of their legal rights and of the charges against them, to assure they are provided counsel, and to set a trial date or a later court date. At an arraignment, a magistrate informs a defendant of the matters in Rule 14.4.

Rule 14.2. When an Arraignment Is Held

(a) Generally. Except as provided in (b), (c), and (d), these time limits apply:

(1) **for defendants in custody,** an arraignment must be held within 10 days after the filing of an indictment, information, or complaint.

(2) **for defendants not in custody,** an arraignment must be held within 30 days after the filing of an indictment, information, or complaint.

(b) Exception for Special Situations. If the court cannot hold the arraignment within the time specified, in Rule 14.2(a) because the defendant has not yet been arrested or summoned, or is in custody elsewhere, the court must hold the arraignment as soon as possible after those time periods.

(c) Exceptions for Limited Jurisdiction Courts. An arraignment is not necessary if:

(1) the defendant's attorney has entered a plea of not guilty; or

(2) the court permits a defendant to enter a not-guilty plea by mail and to receive a court date by mail. Delivery of the notice is presumed if the notice is deposited in the U.S. mail, addressed to the defendant’s last known address, and the notice is not returned to the court.

(d) Exception for Superior Court. The superior court is not required to conduct an arraignment after the filing of an indictment or information if the presiding judge issues an order that Rule 14 does not apply to superior court cases in that county.

(e) Combined Proceedings. If the defendant's first court appearance occurs after the complaint’s filing, the court may hold the arraignment in conjunction with the initial appearance before the magistrate, if the initial appearance is held in the trial court. If the initial appearance is not held in the trial court, the court must order the defendant to appear for arraignment in the trial court within 10 days after the initial appearance, and a written notice of the arraignment date must be delivered to the defendant.

Rule 14.3. The Defendant's Presence

(a) Personal Presence Required. A defendant must be arraigned personally before the trial court or by an interactive video appearance under Rule 1.6.

(b) Personal Presence Not Required if Waived. A defendant who personally appeared at an initial appearance may waive his or her presence at an arraignment in superior court by filing a waiver of personal appearance at arraignment at least two days before the arraignment date. The defendant and the defendant's attorney must sign the waiver, which must be notarized. A defendant who waives personal presence must file an affidavit within 20 days after arraignment stating the defendant is aware of all scheduled court appearances in the matter and understands that failure to appear at sentencing may result in losing the right to a direct appeal.

Rule 14.4. Proceedings at Arraignment

At an arraignment, the court must:

(a) enter the defendant's plea of not guilty, unless the defendant pleads guilty or no contest;

(b) hear and decide motions concerning the conditions of release under Rule 7, provided at least 5 days' notice is given for a contested release motion if notice is not waived by all parties, unless the arraignment is held in conjunction with the defendant's initial appearance before a magistrate under Rule 4.2;

[*current Rule 14.3(b) version*] hear and decide motions concerning the conditions of release under Rule 7. Unless the arraignment is held in conjunction with the defendant's initial appearance before a magistrate under Rule 4.2, a contested release motion shall be heard upon at least 5 days prior notice, unless such time is waived by all parties.

[*proposed amended version*] hear and decide any motion concerning conditions of release under Rule 7, including a contested release motion at an arraignment held in conjunction with the defendant's initial appearance before a magistrate under Rule 4.2 after at least 5 days' notice, unless this notice is waived by all parties.

(c) set the date for trial or a pretrial conference;

(d) inform the parties in writing of the dates set for further proceedings and other important deadlines;

(e) inform the defendant of the right to be present at all future proceedings, that all proceedings other than sentencing may be held in the defendant's absence, and that the defendant may be charged with an offense and a warrant issued for defendant's arrest without further notice;

(f) inform the defendant that if the defendant's absence prevents sentencing from occurring within 90 days following conviction, the defendant may lose the right to a direct appeal to an appellate court;

(g) inform the defendant of the right to jury trial, if applicable;

(h) for misdemeanors, inform the defendant of the right to counsel and the right to court-appointed counsel if eligible, and appoint counsel if necessary; and

(i) order a summoned defendant to be 10-print fingerprinted within 20 calendar days by the appropriate law enforcement agency at a designated time and place if:

(1) the defendant is charged with a felony offense, a violation of A.R.S. § 13-1401, et seq. or A.R.S. § 28-1301, et seq., or a domestic violence offense as defined in A.R.S. § 13-3601; and

(2) the defendant does not present a completed mandatory fingerprint compliance form to the court, or if the court has not received the process control number.

Notes:

Draft Rule 14.1 derives from a comment preceding current Rule 14.1.

Rule 15. Disclosure

Rule 15.1. The State's Disclosures

(a) Initial Disclosures in a Felony Case. Unless a local rule provides or the court orders otherwise:

(1) ***Disclosure.*** The State must make available to the defendant all reports containing information identified in (b)(3) and (b)(4) that the charging attorney possessed when the charge was filed.

(2) ***Timing.*** The State must make these reports available by the arraignment or the preliminary hearing, whichever occurs first.

(b) Supplemental Disclosure. Except as provided in Rule 39(b), the State must make available to the defendant the following material and information within the State's possession or control:

(1) the name and address of each person the State intends to call as a witness in the State's case-in-chief and any relevant written or recorded statement of the witness;

(2) any statement of the defendant and any co-defendant;

(3) all existing original and supplemental reports prepared by a law enforcement agency in connection with the charged offense;

(4) the name and address of each expert who has examined a defendant or any evidence in the case, and the results of any completed physical examination, scientific test, experiment or comparison;

(5) a list of all documents, photographs, and other tangible objects the State intends to use at trial or that were obtained from or purportedly belong to the defendant;

(6) a list of the defendant's prior felony convictions the State intends to use at trial;

(7) a list of the defendant's other acts the State intends to use at trial;

(8) all existing material or information that tends to mitigate or negate the defendant's guilt or would tend to reduce the defendant's punishment;

(9) whether there has been any electronic surveillance of any conversations to which the defendant was a party, or of the defendant's business or residence;

(10) whether a search warrant has been executed in connection with the case; and

(11) whether the case involved an informant, and, if so, the informant's identity, subject to the restrictions under Rule 15.4(b)(2).

(c) Time for Supplemental Disclosures. Unless the court orders otherwise, the State must disclose the material and information listed in (b) no later than:

(1) in the superior court, 30 days after arraignment.

(2) in a limited jurisdiction court**,** the first pre-trial conference, or 20 days after arraignment, whichever occurs first.

(d) Prior Felony Convictions.

(1) ***In a Felony Case.*** At least 30 days before trial or 30 days after the defendant's request—whichever occurs first—the State must make available to a defendant charged with a felony:

(A) a list of prior felony convictions of each witness the State intends to call at trial; and

(B) a list of the prior felony convictions the State intends to use to impeach a disclosed defense witness at trial.

(2) ***In a Misdemeanor Case.*** At least 10 days before trial, the State must make available to a defendant charged with a misdemeanor:

(A) a list of the prior felony convictions of each witness the State intends to call at trial; and

(B) a list of the prior felony convictions the State intends to use to impeach a disclosed defense witness at trial.

(e) Disclosures upon Request.

(1) ***Generally.*** Unless the court orders otherwise, the State must make the following items available to the defendant for examination, testing, and reproduction within 30 days of a defendant's written request:

(A) any of the items specified in the list submitted under (b)(5);

(B) any 911 calls existing at the time of the request that the record's custodian can reasonably ascertain are related to the case; and

(C) any completed written report, statement, and examination notes made by an expert listed in (b)(1) and (b)(4) related to the case.

(2) ***Conditions.*** The State may impose reasonable conditions, including an appropriate stipulation concerning chain of custody to protect physical evidence or to allow time for the examination or testing of any items.

(f) Scope of the State's Disclosure Obligation. The disclosure obligation under Rule 15.1 extends to material and information in the possession or control of any of the following:

(1) the prosecutor, other attorneys in the prosecutor's office, and members of the prosecutor's staff; or

(2) any state, county, or municipal law enforcement agency that has participated in the investigation of the case; and

(3) any other person who is under the prosecutor's direction or control and participated in the investigation or evaluation of the case.

(g) Disclosure by Court Order.

(1) ***Disclosure Order.*** On defendant's motion, a court may order any person to make available to the defendant material or information not included in this rule if the court finds:

(A) the defendant has a substantial need for the material or information to prepare the defendant's case; and

(B) the defendant cannot obtain the substantial equivalent by other means without undue hardship.

(2) ***Modifying or Vacating Order.*** The court may vacate or modify an order if the court determines that compliance would be unreasonable or oppressive.

(h) Disclosure of Rebuttal Evidence. Upon receiving the defendant's notice of defenses under Rule 15.2(b), the State must disclose the name and address of each person the State intends to call as a rebuttal witness, and any relevant written or recorded statement of the witness.

(i) Additional Disclosures in a Capital Case.

(1) ***Notice of Intent to Seek the Death Penalty.***

(A) *Generally.* No later than 60 days after a defendant's arraignment in superior court on a charge of first-degree murder, the State must provide notice to the defendant of whether the State intends to seek the death penalty.

(B) *Time Extensions.* The court may extend the State's deadline for providing notice by an additional 60 days if the parties file a written stipulation agreeing to the extension. If the court approves the extension, the case is considered a capital case for all administrative purposes including, but not limited to, scheduling, appointment of counsel under Rule 6.8, and the assignment of a mitigation specialist. The court may grant additional extensions if the parties file written stipulations agreeing to them.

(C) *Victim Notification.* If the victim has requested notice under A.R.S. § 13-4405, the prosecutor must confer with the victim before agreeing to extend the deadline.

(2) ***Aggravating Circumstances.*** If the State files a notice of intent to seek the death penalty, the State must, at the same time, provide the defendant with a list of aggravating circumstances that the State intends to prove in the aggravation phase of the trial.

(3) ***Initial Disclosures.***

(A) *Generally.* No later than 30 days after filing a notice to seek the death penalty, the State must disclose the following to the defendant:

(i) the name and address of each person the State intends to call as a witness at the aggravation hearing to support each alleged aggravating circumstance, and any written or recorded statement of the witness;

(ii) the name and address of each expert the State intends to call at the aggravation hearing to support each alleged aggravating circumstance, and any written or recorded statement of the expert;

(iii) a list of all documents, photographs or other tangible objects the State intends to use to support each identified aggravating circumstance at the aggravation hearing; and

(iv) all material or information that might mitigate or negate the finding of an aggravating circumstance or mitigate the defendant's culpability.

(B) *Time Extensions.* The court may extend the deadline for the State's initial disclosures under (i)(3) or allow the State to amend those disclosures only if the State shows good cause or the parties stipulate.

(4) ***Rebuttal and Penalty Phase Disclosures.*** Within 60 days of receiving the defendant's disclosure under Rule 15.2(h)(1), the State must disclose the following to the defendant:

(A) the name and address of each person the State intends to call as a rebuttal witness on each identified aggravating circumstance, and any written or recorded statement of the witness;

(B) the name and address of each person the State intends to call as a witness at the penalty hearing, and any written or recorded statement of the witness;

(C) the names and address of each expert the State intends to call at the penalty hearing, and any report the expert has prepared; and

(D) a list of all documents, photographs or other tangible objects the State intends to use during the aggravation and penalty hearings.

(j) Items Prohibited by A.R.S. § 13-3551, et seq.

(1) ***Scope.*** This rule applies to an item that cannot be produced or possessed under A.R.S. § 13-3551 et seq., but is included in the list disclosed under Rule 15.1(b)(5).

(2) ***Disclosure Obligation.*** The State is not required to reproduce the item or release it to the defendant for testing or examination except as provided by (j)(3) and (j)(4). The State must make the item reasonably available for inspection by the defendant, but it must impose such terms and conditions necessary to protect a victim's rights.

(3) ***Court Ordered Disclosure for Examination or Testing.***

(A) *Generally*. The court may order the item's reproduction or its release to the defendant for examination or testing if the defendant makes a substantial showing that it is necessary for the effective investigation or presentation of a defense, including an expert's analysis.

(B) *Conditions*. A court must issue any order necessary to protect a victim's rights, document the chain of custody, or protect physical evidence.

(4) ***General Restrictions.*** In addition to any court order issued, the following restrictions apply to the reproduction or release of any item to the defendant for examination or testing:

(A) the item must not be further reproduced or distributed except as the court order allows;

(B) the item may be viewed or possessed only by the persons authorized by the court order;

(C) the item must not be possessed or viewed by the defendant outside the direct supervision of defense counsel, advisory counsel, or a defense expert;

(D) the item must be delivered to defense counsel or advisory counsel, or if expressly permitted by court order, to a specified defense expert; and

(E) the item must be returned to the State by a court-ordered deadline.

Rule 15.2. The Defendant's Disclosures

(a) Physical Evidence.

(1) ***Generally.*** At any time after the filing of an indictment, information or complaint, and upon the State's written request, the defendant must, in connection with the particular offense with which the defendant is charged:

(A) appear in a line-up;

(B) speak for identification by one or more witnesses;

(C) be fingerprinted, palm-printed, foot-printed, or voice printed;

(D) pose for photographs not involving a re-enactment of an event;

(E) try on clothing;

(F) permit the taking of samples of the defendant's hair, blood, saliva, urine, or other specified materials that involves no unreasonable intrusions of the defendant's body;

(G) provide specimens of the defendant's handwriting; and

(H) submit to a reasonable physical or medical inspection of the defendant's body, but such an inspection may not include a psychiatric or psychological examination.

(2) ***Presence of Counsel.*** The defendant is entitled to have counsel present when the State takes evidence under this rule.

(3) ***Other Procedures.*** This rule supplements and does not limit any other procedures established by law.

(b) Notice of Defenses.

(1) ***Generally.*** By the deadline specified in (d), the defendant must provide written notice to the State specifying all defenses the defendant intends to introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense,

defense of others, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character.

(2) ***Witnesses.*** For each listed defense, the notice must specify each person, other than the defendant, that the defendant intends to call as a witness at trial in support of the defense.

(3) ***Signature and Filing.*** Defense counsel—or if the defendant is self-represented, the defendant—must sign the notice and file it with the court.

(c) Content of Disclosure. At the same time that the defendant files a notice of defenses under (b), the defendant must provide the following information:

(1) the name and address of each person, other than the defendant, the defendant intends to call as a witness at trial, and any written or recorded statement of the witness;

(2) the name and address of each expert the defendant intends to call at trial, the results of any physical examination of the defendant, and of the results of any completed scientific test, experiment or comparison; and

(3) a list of all documents, photographs, and other tangible objects the defendant intends to use at trial.

(d) Time for Disclosures. Unless the court orders otherwise, the defendant must disclose the material and information listed in (b) and (c) no later than:

(1) in superior court, 40 days after arraignment, or within 10 days after the State's disclosure under Rule 15.1(b), whichever occurs first;

(2) in a limited jurisdiction court, 20 days after the State's disclosure under Rule 15.1(b).

(e) Additional Disclosures upon Request.

(1) ***Generally.*** Unless the court orders otherwise, the defendant must make the following items available to the State for examination, testing, and reproduction within 30 days of the State's written request:

(A) any of the items specified in the list submitted under (c)(3); and

(B) any completed written report, statement, and examination notes made by an expert listed in (c)(2) in connection with the particular case.

(2) ***Conditions.*** The defendant may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, the protection of physical evidence, or to allow time for the examination or testing of any items.

(f) Scope of Disclosure. A defendant's disclosure obligation extends to material and information within the possession or control of the defendant, defense counsel, staff, agents, investigators, or any other persons who have participated in the investigation or evaluation of the case and who are under the defendant's direction or control.

(g) Disclosure by Court Order.

(1) ***Disclosure Order.*** On the State's motion, a court may order any person to make available to the State material or information not included in this rule if the court finds:

(A) the State has a substantial need for the material or information for the preparation of the State's case;

(B) the State cannot obtain the substantial equivalent by other means without undue hardship; and

(C) the disclosure of the material or information would not violate the defendant's constitutional rights.

(2) ***Modifying or Vacating Order.*** The court may vacate or modify an order if the court determines that compliance would be unreasonable or oppressive.

(h) Additional Disclosures in a Capital Case.

(1) ***Initial Disclosures.***

(A) *Generally.* Within 180 days after receiving the State's initial disclosure under Rule 15.1(i)(3), the defendant must disclose the following to the State:

(i) a list of all mitigating circumstances the defendant intends to prove;

(ii) the names and address of each person, other than the defendant, the defendant intends to call as a witness during the aggravation and penalty hearings, and any written or recorded statement of the witness;

(iii) the names and address of each expert the defendant intends to call during the aggravation and penalty hearings, and any written or recorded statements of the expert, excluding any portions containing statements by the defendant; and

(iv) a list of any and all documents, photographs, or other tangible objects the defendant intends to use during the aggravation and penalty hearings.

(B) *Time Extensions.* The court may extend the deadline for the defendant's initial disclosures under (h)(1) or allow the defendant to amend those disclosures only if the defendant shows good cause or if the parties stipulate.

(2) ***Later Disclosures.*** Within 60 days of receiving the State's supplemental disclosure under Rule 15.1(i)(4), the defendant must disclose the following to the State:

(A) the name and address of each person the defendant intends to call as a rebuttal witness, and any written or recorded statement of the witness; and

(B) the name and address of each expert the defendant intends to at the penalty hearing, and any report the expert has prepared.

Rule 15.3. Depositions

(a) Availability. A party or a witness may file a motion requesting the court to order the examination of any person, except the defendant and those excluded by Rule 39(b), by oral deposition under the following circumstances:

(1) a party shows that the person's testimony is material to the case and that there is a substantial likelihood that the person will not be available at the time of trial; or

(2) a party shows that the person's testimony is material to the case or necessary to adequately prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing or at the probable cause phase of the juvenile transfer hearing, and that the person will not cooperate in granting a personal interview; or

(3) a witness is incarcerated for failure to give satisfactory security that the witness will appear and testify at a trial or hearing.

(b) Follow-up Examination. If a witness testifies at a preliminary hearing or probable cause phase of a juvenile transfer hearing, the court may order the person to attend and give testimony at a follow-up deposition if:

(1) the magistrate limited the person's previous testimony under Rule 5.3; and

(2) the person will not cooperate in granting a personal interview.

(c) Motion for Taking Deposition; Notice; Service.

(1) ***Motion's Requirements.*** A motion to take a deposition must:

(A) state the name and address of the person to be deposed;

(B) show that a deposition may be ordered under (a) or (b);

(C) specify the time and place for taking the deposition; and

(D) designate any non-privileged documents, photographs, or other tangible objects that the person must produce at the deposition.

(2) ***Order.*** If the court grants the motion, it may modify any of the moving party's proposed terms and specify additional conditions governing how the deposition will be conducted.

(3) ***Notice and Subpoena.*** If the court grants the motion, the moving party must notice the deposition in the manner provided in Arizona Rule of Civil Procedure 30(b). The notice must specify the terms and conditions in the court's order granting the deposition. The moving party also must serve a subpoena on the deponent in the manner provided in A.R.S. § 13-4072.

(d) Manner of Taking.

(1) ***Generally.*** Unless this rule provides or the court orders otherwise, the parties must conduct a deposition as provided in Rules 28(a) and 30 of the Arizona Rules of Civil Procedure.

(2) ***Deposition by Written Questions.*** If the parties consent, the court may order that a deposition be taken on written interrogatories as provided in Rule 31 of the Arizona Rules of Civil Procedure.

(3) ***Deponent Statement.*** Before the deposition, a party who possesses a statement of a deponent must make it available to any other party who would be entitled to the statement at trial.

(4) ***Recording.*** A deposition may be recorded by other than a certified court reporter. If someone other than a certified court reporter records the deposition, the party taking the deposition must provide every other party with a copy of the recording within 14 days after the deposition, or no less than 10 days before trial, whichever is earlier.

(5) ***Remote Means.*** The parties may agree or the court may order that the parties conduct the deposition by telephone or other remote means.

(e) The Defendant's Right to Be Present. A defendant has the right to be present at any deposition ordered under (a)(1) or (a)(3). If a defendant is in custody, the moving party must notify the custodial officer of the deposition's time and place. Unless the

defendant waives in writing the right to be present, the officer must produce the defendant at the deposition and remain with defendant until it is completed.

(f) Use. A party may use a deposition in the same manner as former testimony under Rule 19.3(c).

Rule 15.4. General Disclosure Standards

(a) Statements.

(1) ***Definition of a "Statement."*** In Rule 15, the term "statement" includes:

(A) any writing prepared, signed or otherwise adopted or approved by a person;

(B) any recording of a person's oral communications or a transcript of the communication;

(C) any written record or summary of a person's oral communications; or

(D) an expert's report.

(2) ***Definition of a "Writing."*** A "writing" consists of words or their equivalent set down in physical, electronic, or other form.

(3) ***Exclusion of Superseded Notes.*** Handwritten notes are not a statement if they were substantially incorporated into a document or report within 30 calendar days of their creation, or were preserved electronically, mechanically, or by verbatim dictation.

(b) Materials Not Subject to Disclosure.

(1) ***Work Product.*** A party is not required to disclose legal research or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecutor or defense counsel, members of their respective legal or investigative staff, or law enforcement officers.

(2) ***Informants.*** A party is not required to disclose the existence or identity of an informant who will not be called to testify if:

(A) disclosure would result in substantial risk to the informant or to the informant's operational effectiveness; and

(B) a failure to disclose will not infringe the defendant's constitutional rights.

(c) Failure to Call a Witness or Raise a Defense. At trial, a party may not comment on the fact that a witness's name or a defense is on a list furnished under Rule 15, yet not called or raised, unless the court allows the comment after finding that inclusion of

the witness's name or the defense constituted an abuse of the applicable disclosure rule.

(d) Use of Materials. Any materials furnished to a party or counsel under Rule 15 must not be disclosed to the public, and may be disclosed to others only to the extent necessary for the proper conduct of the case.

(e) Requests for Disclosure. All requests for disclosure must be made to the opposing party.

(f) Filing of Papers; Exception for Misdemeanors and Petty Offenses Filed in Limited Jurisdiction Courts. For misdemeanor and petty offenses triable in limited jurisdiction courts, parties must not file materials disclosed under Rules 15.1 and 15.2, or notices of their service, unless the court orders otherwise or they are filed as attachments or exhibits to other documents relevant to the determination of an issue before the court.

COMMENT

Rule 15.4(a). It is intended that an attorney's actual trial notes, such as his outline of questions to ask a witness will be encompassed within the work product exception of Rule 15.4(b)(1), even though they fall within the definition of statement.

Rule 15.5. Excision and Protective Orders

(a) A Court's Discretion to Deny, Defer or Regulate Disclosure.

(1) ***Witness Identity.*** For good cause, a court may order that a party may defer disclosing a witness's identity for a reasonable period of time, but no later than 5 days before trial.

(2) ***Other Matters.*** A court may order that other disclosures required by Rule 15 be denied, deferred or regulated if it finds that:

(A) disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(B) the risk cannot be eliminated by a less substantial restriction of discovery rights.

(b) A Court's Discretion to Authorize Excision. If the court finds that only a portion of material or other information is subject to disclosure under Rule 15, it may enter an order authorizing the disclosing party to excise the portion that is not subject to disclosure.

(c) Protective and Excision Order Proceedings. If a party files a motion seeking a protective or excision order or requesting the court to determine whether any material or other information is subject to disclosure, the court may conduct an in camera inspection of the material. Counsel for all parties have the right to be heard on the matter before any in camera inspection is conducted.

(d) Preserving the Record. If the court enters an order that any portion of any material or information is not subject to disclosure under Rule 15, the entire text of the material or information must be sealed and preserved in the record for appeal.

(e) Claims of Privilege or Protection. A party who redacts a portion of a disclosed document must clearly identify the redaction and state the legal basis, if it is not clear from the context.

Rule 15.6. Continuing Duty to Disclose; Final Disclosure Deadline; Extension

(a) Continuing Duties. The parties' duties under Rule 15 are continuing duties. Each party must timely disclose new or different information.

(b) Additional Disclosures. Any party who anticipates a need to provide additional disclosure within 30 days before trial must immediately notify both the court and all other parties of the circumstances and when the party will make the additional disclosure.

(c) Final Deadline for Disclosure. Unless otherwise permitted, all disclosure required by Rule 15 must be completed by at least 7 days before trial.

(d) Disclosure After the Final Deadline.

(1) ***Motion to Extend Disclosure.*** If a party seeks to use material or information that was disclosed less than 7 days before trial, the party must file a motion to extend the disclosure deadline and to use the material or information. The moving party also must file a supporting affidavit setting forth facts justifying an extension.

(2) ***Order Granting Motion.*** The court must extend the disclosure deadline and allow the use of the material or information if it finds the material or information:

(A) could not have been discovered or disclosed earlier with due diligence; and

(B) was disclosed immediately upon its discovery.

(3) ***Order Denying Motion or Granting Continuance; Sanctions.*** If the court finds that the moving party has failed to establish facts sufficient to justify an extension under (d)(2), it may:

(A) deny the motion to extend the disclosure deadline and deny the use of the material or information; or

(B) extend the disclosure deadline and allow the use of the material or information and, if it extends the deadline, the court may impose any sanction listed in Rule 15.7 except preclusion or dismissal.

(e) Extension of Time for Completion of Testing.

(1) ***Motion.*** Before the final disclosure deadline in (c), a party may move to extend the deadline to permit the completion of scientific or other testing. The motion must be supported by an affidavit from a crime laboratory representative or other scientific expert stating that additional time is needed to complete the testing or a report based on the testing. The affidavit must specify how much additional time is needed.

(2) ***Order***. If a motion is filed under (e)(1), the court must grant reasonable time to complete disclosure unless the court finds that the need for the extension resulted from dilatory conduct or neglect, or that the request is being made for an improper reason by the moving party or a person listed in Rule 15.1(f) or 15.2(f).

(3) ***Extending Time***. If the court grants a motion under (e)(2), the court may extend other disclosure deadlines as necessary.

COMMENT

Rule 15.6. The parties will have a duty to make continuing disclosures without specific request from any other party. The court should consider the imposition of appropriate sanctions for untimely disclosure as well as nondisclosure, for the entire structure of pretrial proceedings embodied in these rules depends on early and complete evidentiary disclosures.

Rule 15.7. Sanctions

(a) Failure to Disclose.

(1) ***Motion.*** If a party fails to make a disclosure required by Rule 15, any other party may move to compel disclosure and request an appropriate sanction.

(2) ***Order.*** If the court finds that a party failed to make a disclosure required under Rule 15, it must order disclosure and must impose an appropriate sanction, unless the court finds that:

(A) the failure to comply was harmless; or

(B) the party could not have disclosed the information earlier with due diligence and the party disclosed the information immediately upon its discovery.

(3) ***Sanctions.*** In considering an appropriate sanction, a court must take into account the significance of the information not timely disclosed, the impact of the sanction on the party and the victim, and the stage of the proceedings when the party ultimately made the disclosure. Available sanctions include, but are not limited to:

(A) precluding or limiting a witness, the use of evidence, or an argument supporting or opposing a charge or defense;

(B) dismissing the case with or without prejudice;

(C) granting a continuance or declaring a mistrial if necessary in the interests of justice;

(D) holding in contempt a witness, a party, or a person acting under the direction or control of a party;

(E) imposing costs of continuing the proceeding; or

(F) any other appropriate sanction.

(b) Consultation. The court may not consider or schedule a hearing on a motion under (a) unless moving counsel attaches a separate statement certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

(c) Failure to Comply. If a party fails to comply with Rule 15.1 or 15.2, the other party is not required to make any further disclosure except for material or information that tends to mitigate or negate the defendant's guilt as to a charged offense or as the court orders.

Rule 15.8. Disclosure Before a Plea Agreement Expires or Is Withdrawn; Sanctions

(a) Disclosure Obligation. If the State has filed an indictment or information in superior court and extends a plea offer to a defendant, the State must disclose to the defendant when it makes the offer the items listed in Rule 15.1(b) to the extent that it possesses the required information and has not previously made such a disclosure.

(b) Violation. If the State makes the disclosure less than 30 days before the offer expires or is withdrawn, a court may sanction the State under (c) unless the State shows that the prosecutor reasonably believed, based on newly discovered information, that an offer should be withdrawn because it was contrary to the interests of justice.

(c) Effect on Other Required Disclosures. This rule does not affect any disclosure obligation otherwise imposed by law. While a plea offer is pending, the prosecutor must continue to comply with Rule 15.6, but additional disclosures under that rule do not extend the 30-day period specified in (b). Disclosure of evidence after the offer expires or is withdrawn, including the results of any scientific testing, does not violate this rule if the evidence did not exist, or the State was not aware of it, when the State extended the offer.

(d) Sanctions. On a defendant's motion for a violation of this rule, the court must consider the impact of any violation of (a) on the defendant's decision to accept or reject a plea offer. If the court finds that the State's failure to provide a required disclosure materially affected the defendant's decision and if the State declines to reinstate the lapsed or withdrawn plea offer, the court—as a presumptive minimum sanction—must preclude the admission at trial of any evidence not disclosed as required by (a).

Rule 15.9. Appointment of Investigators and Expert Witnesses for Indigent Defendants

(a) Appointment. On application, if the court finds that such assistance is reasonably necessary to adequately present a defense at trial or at sentencing, the court may appoint an investigator, expert witnesses, and/or mitigation specialist for an indigent defendant at county expense.

(b) Ex Parte Proceeding. A defendant may not make an ex parte request under this rule without showing a need for confidentiality. The court must make a verbatim record of any ex parte proceeding, communication, or request, which must be available for appellate review.

(c) Mitigation Specialist. As used in this rule, a "mitigation specialist" is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigation evidence.

(d) Capital Case. In a capital case, a defendant should make any motion for an expert or mitigation specialist no later than 60 days after the State makes its disclosure under Rule 15.1(i)(3).

Rule 16. Pretrial Motions and Hearings

Rule 16.1. General Provisions

(a) Scope. Rule 16 governs court procedures between arraignment and trial, unless another rule provides a specific procedure.

(b) Pretrial Motions. All motions must meet the requirements of Rules 1.6 and 1.9 and must be served as provided in Rule 1.7. Parties must make all motions—orally in court or filed in writing—no later than 20 days before trial, except that lack of jurisdiction may be raised at any time. Responsive pleadings are allowed as provided in Rule 1.9. The court may modify motion deadlines for good cause.

(c) Effect of a Failure to File or Make a Timely Motion. The court may preclude any motion, defense, objection, or request not timely raised by motion under (b), unless the basis was not then known and could not have been known through reasonable diligence, and the party raises it promptly after the basis is known.

(d) Court Review. The court may rule on motions when it concludes it can render a reasoned decision without setting an evidentiary hearing, reviewing written memoranda, or taking the matter under advisement.

(e) Finality of Pretrial Determinations. Except for good cause or as these rules provide otherwise, a court may not reconsider an issue that it previously decided.

(f) Relevant Issues for Jury Determination. This rule does not preclude the defendant from presenting relevant issues and properly disclosed defenses to the jury, such as voluntariness or identification.

Rule 16.2. Procedure on Pretrial Motions to Suppress Evidence

(a) Duty of Court to Inform the Defendant. If an issue arises before trial concerning the constitutionality of using specific evidence against the defendant and the defendant is not represented by counsel, the court must inform the defendant that:

(1) the defendant may, but is not required to, testify at a pretrial hearing about the circumstances surrounding the acquisition of the evidence;

(2) if the defendant testifies at the hearing, the defendant will be subject to cross-examination;

(3) by testifying at the hearing, the defendant does not waive the right to remain silent at trial; and

(4) the defendant's testimony at the hearing will not be disclosed to the jury unless the defendant testifies at trial concerning the same matters.

(b) Burden of Proof on Pretrial Motions to Suppress Evidence.

(1) ***Generally.*** Subject to (b)(2), the State has the burden of proving by a preponderance of the evidence the lawfulness in all respects of the acquisition of all evidence that the prosecutor will use at trial.

(2) ***Defendant's Burden.*** If any of the conditions listed below are present, the State's burden of proof under Rule 16.2(b)(1) arises only after the defendant comes forward/presents/alleges specific circumstances that establish a prima facie case supporting the suppression of the evidence at issue:

(A) the evidence involves a confession, identification, or search and seizure and the defendant is entitled under Rule 15 to discover how the evidence was obtained;

(B) defense counsel was present when the evidence was taken; or

(C) the evidence was obtained pursuant to a warrant.

Rule 16.3. Pretrial Conference

(a) Generally. A court may conduct one or more pretrial conferences. The court may establish procedures and requirements that are necessary to accomplish a conference's objectives, including identifying appropriate cases for pretrial conferences, identifying who must attend, and determining sanctions for failing to attend. In the superior court, the court must conduct at least one pretrial conference.

(b) Objectives. The objectives of a pretrial conference may include:

(1) providing a forum and a process for the fair, orderly, and just disposition of cases without trial;

(2) permitting the parties, without prejudice to their rights to trial, to engage in disclosure and to conduct negotiations for dispositions without trial;

(3) providing an opportunity for complying with discovery requirements set forth in these rules and constitutional law; and

(4) enabling the court to set a trial date.

(c) Duty to Confer; Memoranda. The court may require the parties to confer before the conference or to file memoranda before the conference if it concludes that either would be helpful to the court. The court may set the requirements for what the memoranda should contain.

(d) Scope of Proceeding. At the conference the court may:

(1) hear motions made at or filed before the conference;

(2) set additional pretrial conferences and evidentiary hearings as appropriate;

(3) obtain stipulations to relevant facts; and

(4) discuss and determine any other matters that will promote a fair and expeditious trial, including imposing time limits on trial proceedings, using juror notebooks, giving brief pre-voir dire opening statements and preliminary instructions, and managing documents and exhibits effectively during trial.

(e) Stipulated Evidence. At a pretrial conference or any time before the start of an evidentiary hearing, the parties may submit any issue to the court for decision based on stipulated evidence.

(f) Record of Proceedings. Proceedings at a pretrial conference must be on the record.

Rule 16.4. Dismissal of Prosecution

(a) On the State's Motion. On the State's motion and for good cause, the court may order a prosecution dismissed if it finds that the dismissal is not to avoid Rule 8 time limits.

(b) On a Defendant's Motion. On a defendant's motion, the court must order a prosecution's dismissal if it finds that the indictment, information, or complaint is insufficient as a matter of law. Alternatively, the court may order amendment of the indictment under Rule 13.5.

(c) Record. If the court grants a motion to dismiss a prosecution, it must state on the record its reasons for ordering dismissal.

(d) Effect of Dismissal. Dismissal of a prosecution is without prejudice to commencing another prosecution, unless the court finds that the interests of justice require that the dismissal to be with prejudice.

(e) Release of Defendant; Exoneration of Bond. If a court dismisses a prosecution, the court must order the release of the defendant from custody, unless he or she also is being held on another charge. It also must exonerate any appearance bond.

Rule 22. Deliberations

Rule 22.1. Instructions and Retirement

(a) Retirement.

(1) ***Instructions.*** Before the jury retires to begin its deliberations, the court must instruct the jury on the applicable law, the procedures it must follow during deliberations, and the appropriate method to report the results of its deliberations. The instructions must be recorded or in writing and be available to the jurors during deliberations.

(2) ***Foreperson.*** The court must appoint, or instruct the jurors to elect, a foreperson.

(3) ***Retirement.*** After instructing the jury, the court must direct the jury to retire under the charge of a court officer to begin its deliberations.

(b) Permitting the Jury to Disperse. The court may permit the jurors to disperse after they begin their deliberations. The court must instruct the jurors when to reassemble and admonish the jury under Rule 19.4.

(c) Length of Jury Deliberations. The court must not require a jury to deliberate after normal working hours unless the court, after consulting with the jury and the parties, determines that evening or weekend deliberations are necessary in the interest of justice and does not impose an undue hardship on the jurors.

Rule 22.2. Materials Used During Deliberations

(a) Generally. Upon retiring for deliberations, jurors must take into the jury room:

(1) forms of verdict approved by the court;

(2) jurors' copies of the court's instructions;

(3) jurors' notes; and

(4) tangible evidence as the court directs.

(b) Verdict Form Limitation. The form of verdict must not indicate whether the described offense is a felony or a misdemeanor, unless the statute on which the offense is based directs that the jury make this determination.

Rule 22.3. Repeating Testimony and Additional Instructions

(a) Repeating Testimony. If after retiring to consider their verdict, jurors request that any testimony be repeated, the court may recall the jury to the courtroom and order

the testimony read or replayed. The court also may order other testimony repeated so as not to give undue emphasis to particular testimony.

(b) Additional Instructions. If, after the jury retires, the jury or a party requests additional instructions, the court may recall the jury to the courtroom and further instruct the jury as appropriate.

(c) Notice. The court must give the parties notice before testimony is repeated, or before giving additional instructions.

Rule 22.4. Assisting Jurors at Impasse

If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the parties' presence, ask the jury to determine whether and how court and counsel can assist the jury's deliberations. After receiving the jurors' response, if any, the judge may direct further proceedings as appropriate.

RULE 22.4, COMMENT TO 1995 AMENDMENT [Note: Consider keeping this comment.]

Many juries, after reporting to the judge that they have reached an impasse in their deliberations, are needlessly discharged very soon thereafter and a mistrial declared when it would be appropriate and might be helpful for the judge to offer some assistance in hopes of improving the chances of a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practically possible to do so. The invitation to dialogue should not be coercive, suggestive or unduly intrusive.

The judge's response to the jurors' report of impasse could take the following form:

"This instruction is offered to help your deliberations, not to force you to reach a verdict.

"You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

"If you still have disagreement, you may wish to identify for the court and counsel which issues or questions or law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.

"I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try."

If the jury identifies one or more issues that divide them, the court, with the help of the attorneys, can decide whether and how the issues can be addressed. Among the obvious

options are the following; giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures. Of course, the court might decide that it is not legally or practically possible to respond to the jury's concerns.

Rule 22.5. Discharging a Jury

(a) Generally. The court must discharge the jury:

(1) when its verdict has been recorded under Rule 23;

(2) if the court determines there is no reasonable probability that the jurors can agree upon a verdict; or

(3) when the court determines a necessity exists for its discharge.

(b) Disclosures and Release from Confidentiality. When discharging a jury at the conclusion of the case, the court must advise the jurors that they are released from service. If appropriate, the court must release them from their duty of confidentiality and explain their rights regarding inquiries from counsel, the media, or any person.